

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

IN THE MATTER OF
BRASFIELD & GORRIE, LLC

Respondent

And

Case No: 09-CA-199567

UNITED BROTHERHOOD OF CARPENTERS
AND JOINERS OF AMERICA (UBC),
INDIANA/KENTUCKY/OHIO REGIONAL
COUNCIL OF CARPENTERS
LOCAL 8-719

Charging Party

UNION'S BRIEF IN SUPPORT OF EXCEPTIONS BEFORE THE BOARD

This case involves an unfair labor practice charge alleging that Respondent violated Section 8 (a)(1) of the Act by creating an impression of surveillance when Respondent's senior safety manager, John Wickham, took pictures of employees as they gathered in front of Respondent's jobsite. The amended charge further alleges that about May 25, 2017, Respondent, by John Wickham, engaged in surveillance of its employees by taking pictures and videotaping employees as they gathered outside Respondent's jobsite.

During the time that Respondent engaged in surveillance of the employees, employees who worked for Respondent and for its subcontractors, PCC and PDC, were protesting wages and other terms and conditions of employment. Such protests and subsequent picketing by the employees were protected and concerted activities. See *Triad Management Corporation*, 287 NLRB 1239 (1988); *Atlantic Scaffolding Company*, 356 NLRB No. 113 (2001) The conduct that occurred on May 24 and 25, 2017 created fear among the employees to the extent that a couple of days later the employees who had gathered and picketed in front of the jobsite, returned to work in fear of losing their employment.

The Board and courts have long held that photographing employees or videotaping employees by an employer such as in this case violates the Act since photographing employees creates fear among the employees of future reprisals. *National Steel*, 324 NLRB 499 (1997). In *F. W. Woolworth*, 310 NLRB 1197 (1993) the Board held that photographing employees in the mere belief that something might happen does not justify the employer's conduct when balanced against the interference of employees' right to engage in concerted and protected activity. Rather, the inquiry is whether photographing or videotaping employees has a reasonable tendency to interfere with the employees' protected activity. *Sunbelt Mfg.*, 308 NLRM 780 (1992).

In this case, Respondent admitted that it had photographed and videotaped employees while they were engaged in protected and concerted activities. The fact that Respondent was concerned with safety issues and had a safety policy does not justify its actions in photographing and videotaping employees while they engaged in protected and concerted activities. During the times Respondent engaged in photographing and videotaping employees, no documented incidents had occurred that would warrant the documenting or recording of employees' actions as they engaged in their protected and concerted activities.

The Administrative Law Judge erred by using the wrong standard in the application of his decision. Under *National Steel*, 324 NLRB 499 (1997) the Board requires that an employer apply an objective standard when engaging in photographing and videotaping employee's activities. In *National Steel* the Board rejected the Administrative Law Judge's statement that an employer's subjective, honest belief that unprotected conduct may occur constitutes solid justification for recordation of protected activity. Rather, under the legal principles, the employer must show that it had a reasonable objective basis for anticipating misconduct. *National Steel*, p. 499, fn 4).

Here, the Administrative Law Judge stated that on May 25, 2017, Respondent's, safety manager Wickham, took two photographs of picketers at the employee entrance at the northeast corner of the intersection between South 3rd Street and West Muhammed Ali Boulevard. (ALJ p. 10, ln, 4-6) The ALJ states in his decision that Wickham saw employees "come up, then turn around, and walk away when they got to the picketers at the entrance, and at least one employee actually walked down the lane of traffic of South 3rd Street to access the jobsite. Employees also reported the same to him." As the Administrative Law Judge stated, Wickham took the photographs because he, Wickham, "believed that the picketers were creating unsafe conditions, and he wanted to document it. Wickham did not say or do anything else to the picketers when he took the pictures." The Administrative Law Judge stated that "in light of the evidence, and consistent with established precedent I find that Wickham, who is the Senior Safety Director, had a legitimate justification for photographing the picketers who were blocking employees from safely accessing the jobsite." ALJ Decision, 4-17)

As stated above, under *National Steel*, the Board requires more than a subjective belief by the employer that something might happen. A subjective belief by the employer does not justify the employer's actions in photographing and videotaping employees when balanced against the tendency of that conduct to interfere with the employees' right to engage in concerted activity. *National Steel*, supra; *F.W. Woolworth Co.*, supra. As the Seventh Circuit Court held, "the Board may properly require a

company to provide a solid justification for its resort to anticipatory photographing.” *NLRB v. Colonial Haven Nursing Home*, 542 F.2d 691, 701 (7th Cir, 1976).

In this case Respondent introduced no testimony by employees or witnesses other than Wickham that any employees were presumably prevented from entering into the jobsite because of the picketing activity. No evidence was presented by Respondent to show that citations by local police were issued against the Union or that picketers had engaged in any misconduct that prevented employees from entering the jobsite. No evidence was presented by Respondent that any safety issues had resulted because of the picketing activity at the entrance to the jobsite. The Administrative Law Judge noted that Wickham “believed the picketers were creating unsafe conditions.” Such subjective belief is not enough to outweigh the employees’ right to participate in concerted and protected activity. *National Steel*, supra. The Administrative Law Judge accepted hearsay testimony that employees had reported to Wickham that blocking of ingress by employees had occurred. (ALJ Decision, p. 10, ln, 10)

The Administrative Law Judge stated that Wickham had deleted the photographs that he took of the picketers because “the picketers eventually moved from the entrance.” (ALJ Decision, p. 10, fn 9) As the ALJ stated, “I find the deletion of the photos and video was not unreasonable under the circumstances. Wickham testified that this is the first time that he had ever dealt with any sort of work stoppage. (Tr. 246). He did not see a reason to keep the video.” (ALJ decision, p.10, fn 9)

Again, taking photographs and then deleting them because Respondent believed that something had occurred that necessitated the taking of the photographs is insufficient as a standard under *National Steel*. Moreover, that because it was the first time that Wickham “had dealt with any sort of work stoppage,” belies the reason that Wickham was taking the photographs of the picketing activity. The fact that there was a work stoppage is the right that the employees had that is protected under the law. There are no safety concerns inherently related with all work stoppages, and there was no

substantive evidence produced by Respondent at trial that Wickham took pictures of the picketers for safety reasons. Again, the Administrative Law Judge erred in applying the principles as set out in *National Steel*.

The Administrative Law Judge stated that on May 25, 2017, “three Union agents who stopped their trucks on South 3rd Street, got out, and began honking their horns in support of the picketers.” As the Administrative Law Judge stated, “Wickham testified, unrefuted, that the Union agents were blocking traffic on South 3rd Street, which is a street suppliers use to enter the jobsite to make deliveries. Wickham took a video of the scene – as it was occurring. Wickham did not say or do anything else other than take the video.” (ALJ Decision, pp. 19-24)

Remarkably, the ALJ concluded that based upon the sole testimony of Wickham, Respondent had a legitimate justification for taking the videos of the Union trucks and drivers as they honked their horns in support of the picketers. No evidence was presented that the three Union vehicles were blocking traffic on Third Street, or more importantly that the trucks were blocking ingress to the jobsite. In fact after the police arrived to investigate the alleged traffic disruption, the police did not report anything or issue citations to the men driving the vehicles. No independent or neutral witnesses were presented by Respondent at trial stating that a blocking of ingress to the jobsite had occurred. No safety reports were issued by Wickham, the chief safety manager for the Respondent, about the alleged incident. No documentary evidence, photographs, reports taken of the alleged incidents, or any other substantive evidence or probative facts were submitted by Respondent in support of its position. No citations were issued by the local police or city indicating that the “horn blowing” was in violation of the law or that the vehicles were causing a traffic problem. No evidence was presented at trial that Wickham followed up on the alleged incident or brought up the issue at the regular weekly safety meetings. No follow-up meetings were held by Respondent with its employees to explain the reason why such videotaping was done. See *Sunbelt Manufacturing, Inc.*, 308 NLRB 780, 7789, (1992) where

the Board held that explaining the reason for the videotaping of employees in a meeting of its workforce was an important factor in meeting a legitimate justification under *National Steel*.

Yet, and contrary to the dictates in *National Steel*, the Administrative Law Judge concluded that Respondent had a “legitimate justification” for taking the videos of the men who were driving the Union vehicles along Third Street in downtown Louisville. The Administrative Law Judge cites in support of his conclusion to the Board’s decision *Town & Country Supermarkets*, 340 NLRB 1410 (2004) Contrary to the instant case, the Board and ALJ in *Town & Country*, reviewed an abundance of substantive and probative evidence, including photographs and documents in deciding the case. Police reports and citations were submitted as determining evidence. In *Town & Country*, the ALJ and Board examined such evidence to determine whether the respondent had violated the Act under *National Steel* and whether respondent had justification for taking photographs and videos of the employees’ activities. No evidence similar to what was produced in *Town & Country* was produced in the instant case to show whether the surveillance conducted by Respondent was legitimately justified or whether Respondent’s actions in taking the photographs and videos had violated the standard under *National Steel*.

The Administrative Law Judge referred to *Saia Motor Freight Line*, 333 NLRB 784 (2001) in support of his conclusion. Again, as in *Town & Country*, supra, the ALJ and Board had an abundance of evidence to draw upon in reaching its conclusion. Photographs, witness testimony and police reports were examined in reaching a conclusion. Moreover, in *Saia*, the Board examined whether the employer could take photographs of picketers for the purpose of preserving evidence. Such was not the case in the instant case since Wickham had deleted the videos and pictures shortly after taking them (ALJ Decision p. 10, fn 9) The same reasoning can be applied to the Administrative Law Judge’s cases that he relied upon in *Cable Car Advertisers, Inc.*, 324 NLRB 732 (1997) and *Concord Metal, Inc.*, 295 NLRB 912 (1989) In those cases an abundance of substantive and probative evidence was submitted for the ALJ and Board to rely upon. Again, the Administrative Law Judge concluded his analysis and decision

without the necessary evidence that could be used to determine whether the rights of the employees and Union were violated as detailed in *National Steel*, supra.

Finally, the Administrative Law Judge states in his decision that the photos and videos were taken “as the misconduct was occurring,” and therefore, Respondent did not take the photos and videos in anticipation of “misconduct”. (ALJ Decision p. 10, pp. 30-35) As the Board has held in *National Steel*, “under the legal principles we have recited, the employer must show that it had a reasonable **objective basis** (emp. added) for anticipating misconduct. First, there was no substantive evidence submitted at trial that any “misconduct” had occurred. Secondly, Respondent had no reasonable, objective basis to conclude that Respondent could anticipate any misconduct. Photographing and videotaping something that is considered to be “misconduct” without evidence to show the misconduct occurred violates the law.

Again, the Administrative Law Judge here uses an alleged occurrence to be true based upon the premise and no other evidence. The ALJ states that the “misconduct” was occurring and so Respondent did not anticipate the misconduct because it was already happening or had happened. Certainly, as the record shows, Wickham did not investigate the alleged safety issues before taking their photographs. Nor did Wickham or anyone representing Respondent talk to the men driving the Union vehicles before deciding to videotape them. No neutral witnesses or employees were presented at trial in support of Respondent’s assertion that the photographs and videos were taken because of safety concerns. Wickham did not even call back the police to see if they were going to issue citations against the Union men. Finally, Wickham decided to delete the videotapes and photographs shortly after he took them. He did not take or present the photos or videos to the safety meetings he regularly conducts in order to examine whether any safety standards had been breached. Based upon these actions, it must be concluded that safety concerns were not the reason why the pictures were taken, and it must be

concluded that the Administrative law Judge based his decision without following the principles and standards as outlined in *National Steel* and the cases that followed *National Steel*. .

Accordingly, the Union respectfully urges that the Board reverse the Administrative Law Decision in this case and uphold the complaint in its entirety.

Respectfully submitted,

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